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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Distribution of the 2014-17 Satellite Royalty Funds	)	**DOCKET NUMBER 16-CRB-0010-SD** **(2014-17)**

REPLY COMMENTS OF THE JOINT SPORTS CLAIMANTS CONCERNING CATEGORIZATION ISSUES

The Joint Sports Claimants[1] ("JSC") submit the following reply to the initial comments filed by Program Suppliers and Multigroup Claimants in response to the Copyright Royalty Judges' ("Judges") "Notice of Participants and Order for Preliminary Action to Address Categories of Claims" (Mar. 20, 2019) ("Notice"). *See* Program Suppliers' Brief Regarding Proposed Claimant Group Definitions" (Apr. 19, 2019) ("PS Br."); Multigroup Claimants' Comments on Claimant Category Definitions and Proposed Modification (Apr. 19, 2019) ("MGC Br.").[2]

INTRODUCTION AND SUMMARY

The Unclaimed Funds Ruling. Program Suppliers seek to overturn the approximately forty-year-old procedure by which the Judges and their predecessors have managed the highly complex task of allocating and distributing royalties to thousands of claimants. Under this long-standing procedure, known as the "Unclaimed Funds Ruling," the Judges allocate royalties among the various categories of programming ("Claimant Categories") in an initial "Allocation Phase" as

[1] The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women's National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

[2] JSC joined the comments filed by Broadcaster Claimants Group, Devotional Claimants, and Music Claimants, in support of the adoption of the same category definitions used in the 2010-13 cable proceeding and numerous proceedings before that. *See* Joint Comments of 2014-17 Satellite Participants on Allocation Phase Claimant Category Definitions (Apr. 19, 2019) ("Joint Br."). JSC file this separate reply in light of the comments of Program Suppliers and MGC concerning the JSC category.

if all copyright owners in each category had filed valid claims. Royalties allocated in the Allocation Phase are then subsequently distributed among only those with valid claims by way of voluntary settlement or a "Distribution Phase" proceeding. The Unclaimed Funds Ruling, which was originally proposed by Program Suppliers, promotes the purpose of Section 119 by reducing transaction costs and encouraging settlements. Absent the Unclaimed Funds Ruling, the Section 119 allocation process would be far more complex and burdensome for both the Judges and the parties, with the potential for litigation among thousands of claimants concerning the validity of each claim prior to the initial allocation.

Program Suppliers' request to reverse the Unclaimed Funds Ruling is flawed for multiple reasons. ***First,*** contrary to Program Suppliers' suggestion, the Unclaimed Funds Ruling is entirely consistent with both the text and purpose of Section 119 of the Copyright Act. Nothing in the Copyright Act prohibits the Judges from adopting an efficient procedure that results in the distribution of royalties to eligible claimants without the need for initial claimant-by-claimant litigation regarding the validity of thousands of claims. Program Suppliers focus on Section 119's requirement that royalties be distributed only to eligible claimants. But they ignore the fact that that is precisely what occurs under the Unclaimed Funds Ruling, whereby after the initial allocation royalties are distributed only to eligible claimants by virtue of settlement or a Phase II (Distribution) proceeding. If Program Suppliers were correct (and they are not) that the Unclaimed Funds Ruling runs afoul of the Copyright Act, the Judges and their predecessors have been in violation of the Copyright Act for the last forty years. This, of course, is not the case. To the contrary, after decades of consistent application, the Unclaimed Funds Ruling is well-established precedent which should be followed.

Second, Program Suppliers' request for reversal of the Unclaimed Funds Ruling at this juncture is untimely and would be unfair and violate the due process rights of the parties. The parties have conducted studies to support their proposed 2014-2017 royalty allocations based on the Judges' and their predecessors' four-decade long application of the Unclaimed Funds Ruling, and all parties', including Program Suppliers', concurrence with the Ruling. Indeed, disrupting other parties' studies is the underlying goal of Program Suppliers' effort to undo the Unclaimed Funds Ruling. PS Br. at 6. When the Judges last rejected Program Suppliers' attempt to overturn the Unclaimed Funds Ruling, in the 2010-13 cable and satellite proceedings, they suggested that if Program Suppliers wanted the Ruling changed for future proceedings, they should raise the issue in a petition for a rulemaking or in any event closer in time to the collection of the royalties that would be at issue in those proceedings. Program Suppliers instead attempt to bootstrap an attack on the Unclaimed Funds Ruling into their comments in response to the Notice and their request should therefore be rejected.

Program Suppliers' Revised Claimant Category Definitions. In addition to seeking reversal of the Unclaimed Funds Ruling, Program Supplies seek to change the long-standing Claimant Category definitions that have contributed to the efficient resolution of allocation proceedings for decades. Program Suppliers argue that changes to the Claimant Category definitions are necessary to "promote clarity and eliminate any ambiguity." PS Br. at 7. However, Program Suppliers do not identify any actual lack of clarity or ambiguity in the existing definitions. There is none. Indeed, during the 2010-13 cable allocation proceeding, there were no disputes between Program Suppliers and JSC about whether any program fell within the Program Supplier or JSC category. Simply put, Program Suppliers are advocating for a solution in search of a non-existent problem.

Moreover, Program Suppliers' proposed changes to the definition actually introduce rather than eliminate ambiguity, by incorrectly implying that some live professional and college team sports telecasts may fall within the Program Supplier or Commercial Television categories. And, Program Suppliers propose to make changes where they believe it might enhance the Judges' perception of the value of their programming, while failing to clarify the full scope of the Program Supplier category. Such selective editing is self-serving, not an effort to promote clarity.

Multigroup Claimants' Revised Claimant Category Definitions. Multigroup Claimants ("MGC") seek to alter the long-standing definition of the JSC category to include all programming of a "predominantly sports nature." MGC Br. at 15-16. MGC's request is without foundation or merit. As an initial matter, MGC has not shown that it represents a single claimant in the 2014-17 proceedings whose categorization would change as a result of MGC's proposed revisions. More fundamentally, MGC argues without any support that there is no basis to categorize live professional and collegiate team sports differently from other types of sports. But, of course, a live professional or college baseball, football, basketball, or hockey game is very different than a horse race or professional wrestling, as JSC witnesses testified in the 2010-13 cable proceeding. Further, MGC does not provide any specific detail as to what programming would be included in its proposed expanded sports definition. For all of these reasons, MGC's requested revision should be denied.

DISCUSSION

I. The Judges Should Not Reverse The Unclaimed Funds Ruling

Since the very first cable royalty allocation proceeding in 1978, the Judges have consistently applied the Unclaimed Funds Ruling. Under this Ruling, in "Phase I" or "Allocation Phase" proceedings, the Judges allocate royalties among the different Claimant Categories as though all of the copyright owners in each category had filed valid claims to royalties. After the

initial allocation, the royalties are distributed within the Claimant Categories to claimants with valid claims through either voluntary settlement or a distribution phase proceeding. *See* 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980) ("1978 Final Determination"). As the Copyright Royalty Tribunal ("CRT") explained, "royalty fees will be allocated to categories of claimants as if all eligible claimants in each category had filed valid claims. The share of each individual claimant in a category will be determined by voluntary agreement or our Phase II decisions." *Id.* The Unclaimed Funds Ruling plays a very important role by transforming what would be a proceeding requiring allocation among thousands of claimants into an allocation among eight Claimant Categories. *See* Order Regarding Discovery, 14-CRB-0010-CD (2010-13) (July 21, 2016) ("2010-13 Cable Order") ("[P]rogramming categories are created and agreed to by the parties for the purpose of 'determining relative value among program types,' not among all programs without regard to their Phase I categorization.") (quoting 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12793 (Apr. 15, 1986)).

The Unclaimed Funds Ruling is entirely consistent with the Copyright Act and promotes Section 119's goals of reducing transaction costs and promoting settlements. As Program Suppliers themselves argued in the 1978 cable proceeding in which the Ruling was adopted, the Unclaimed Funds Ruling "is reasonable and appropriate because it permits the allocation among categories to be made in a relatively straightforward manner which lends itself to continuing application." *See* Exhibit A, Brief of the MPAA, Its Member Companies, and Certain Other Program Producers and Distributors on the Issue of Categories of Claimants Not Fully Represented in CRT Doc. No. 79-1 at 6 (May 23, 1980).

For several reasons, the Program Suppliers' request to reverse the Unclaimed Funds Ruling should be rejected.

A. The Unclaimed Funds Ruling Is Consistent With And Furthers The Purposes Of The Copyright Act

Congress enacted Section 111 of the Copyright to reduce transaction costs associated with negotiating copyright licenses and to encourage settlements, and this rationale applies equally to the Section 119 license. *See Nat'l Ass'n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 911 (D.C. Cir. 1998); 1998-99 Phase II Determination, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015); Order Granting Phase I Claimants' Motion for Partial Distribution of 2004 and 2005 Cable Royalty Funds, No. 2007-03 CRB CD 2004–2005, at 3 (Apr. 10, 2008) ("[T]he policy of the Copyright Act [is] to promote settlements."); Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 32 (Aug. 1, 1997); *see also Indep. Producers Grp. v. Librarian of Cong.*, 759 F.3d 100, 102 (D.C. Cir. 2014) (Judges' functions include "encourag[ing] settlements"). Section 803(a)(1) stems in part from the recognition that the parties require "reliable precedent upon which [they] can base the settlement of their differences." *Copyright Royalty and Distribution Act of 2003: Hearings on H.R. 1417 Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 108th Cong. 5, 7 (2003) (statement of Marybeth Peters, Register of Copyrights). Concerns over the cost of compulsory licensing royalty proceedings also supported Congress's decision to eliminate the CARP process in favor of adjudication by the Judges. *See* H.R. Rep. No. 108-408, at 29, 30, 32, 99, 100, 119 ("2004 House Report").

The Unclaimed Funds Ruling achieves both of these objectives. Including all programming within a Claimant Category for purposes of the allocation phase permits the Judges to make an allocation among eight Claimant Categories rather than first litigating the question of

validity among each of the thousands of claims before performing an allocation. And the goal of promoting settlement is achieved when, following the allocation stage, members of each claimant category attempt to voluntarily resolve how to distribute the funds allocated to their category among its members.

One need look no further than the 2010-13 cable allocation proceeding to see that the Unclaimed Funds Ruling has been effective in reducing transaction costs and promoting settlements. More than 99% of the 2010-13 cable royalties will be distributed by the claimant representatives to copyright owners in their category without any litigation before the Judges. Joint Br. at 2. Several claimant categories settled all Phase II disputes without litigation, including PTV, Canadians, Commercial Television, and Music. Only two categories— Program Suppliers and Devotional Claimants—required a hearing to adjudicate Distribution Phase claims disputes. *See* Distribution of Cable Royalty Funds; Distribution of Satellite Royalty Funds, 83 Fed. Reg. 61683 (Nov. 30, 2018) (noting that "[d]istribution of funds allocated to all other program categories" was "without controversy.").

Program Suppliers seek to convert the orderly process under the Unclaimed Funds Ruling into a free-for-all where every one of the thousands of claims at issue is subject to discovery and challenge prior to the allocation of royalties. Indeed, Program Suppliers seek to allow inter-category discovery where claimants having no claim to programming in a given category could nonetheless engage in discovery regarding the validity of claims in other categories. This is exactly the opposite of what Section 119 was designed to achieve.

According to Program Suppliers, the Judges must reverse the Unclaimed Funds Ruling in order to comply with Section 119. This is simply wrong. Nothing in Section 119 prohibits the current allocation procedure. Program Suppliers argue that only valid claims may receive a share

of the royalties. But they ignore the fact that that is precisely what happens under the Unclaimed Funds Ruling. After the initial allocation among Claimant Categories, funds are distributed only to valid claimants based on voluntary settlements or through Phase II distribution proceedings. Disputes, if any, as to the validity of particular claims are addressed and resolved at that point. There is no reason to engage in pre-allocation inter-category discovery and litigation among thousands of claimants when in most cases no one contests a claimants right to a distribution.[3]

B. The Unclaimed Funds Ruling Is Binding Precedent

The Judges have a "statutory obligation to follow precedent established by prior determinations . . . ." *Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132, 141 (D.C. Cir. 2015). Section 803(a)(1) of the Copyright Act, 17 U.S.C. § 803(a)(1), requires the Judges to "act on the basis of . . . prior determinations and interpretations" of the CRT, Librarian of Congress, Register of Copyrights, Copyright Arbitration Royalty Panels, and the Judges, and decisions of the court of appeals. Section 803(a)(1) reflects a Congressional concern with ensuring that royalty distribution proceedings not become "unpredictable and inconsistent." 2004 House Report at 18. While prior rulings are "not necessarily controlling," they have "precedential value" and must be followed unless "distinguished." *Id.* at 27. Consistent with Section 803(a)(1), the Judges have "identified" and relied upon the "basic principles from the[] earlier proceedings." Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds, 78 Fed. Reg. 64984, 64986 (Oct. 30, 2013); *see also* Distribution of 1998 and 1999 Cable Royalty Funds, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015).

The Unclaimed Funds Ruling constitutes a forty-year running prior determination of the Judges and their predecessors. *See, e.g.*, Order of the Register of Copyrights, 2001-8 CARP CD

[3] Program Suppliers also argue that the Unclaimed Funds Ruling allows claimant representatives to "improperly inflate their . . . claims with ineligible works." PS Br. at 5-6. However, they provide no support for this assertion.

98-99, at 13 (Mar. 20, 2003) (denying MPAA request for inter-category claims discovery in light of Unclaimed Funds Ruling). It has governed every allocation proceeding since the enactment of the Section 111 cable compulsory license, and is an essential element of the basic distinction between the Allocation and Distribution Phases that the Judges and their predecessors have consistently drawn reliably and efficiently allocate royalties. The parties have relied on the Ruling in developing their evidence. It thus constitutes precedent which must be followed unless "distinguished."[4] 2004 House Report at 27.

Program Suppliers provide no basis for distinguishing the 2014-17 satellite royalty funds from the 1978-2013 royalty funds that have been allocated under the Unclaimed Funds Ruling. As in every prior allocation proceeding, the Unclaimed Funds Ruling serves to streamline significantly the allocation process and to allow for an allocation among eight Claimant Categories rather than among thousands of individual claimants. The reasons for applying the Unclaimed Funds Ruling at present are as strong, if not stronger, than they were in 1978 given the increase in the number of claimants participating in allocation proceedings.

C. Reversing The Unclaimed Funds Ruling Now Would Be Unfair And Violate Due Process

The Judges initiated this proceeding on February 8, 2019 to distribute the 2014-17 satellite royalty funds, the latest of which satellite carriers were required to pay by the Spring of 2018 and the first of which satellite carriers paid in the Fall of 2014. Distribution of Satellite Royalty Funds, 84 Fed. Reg. 2931 (Feb. 8, 2019). It has therefore been more than four years since the first funds at issue were paid to the Copyright Office, and nearly a year since the last were paid. During these

[4] While the CRT acknowledged in the 1978 Final Determination that the Unclaimed Funds Ruling might not apply in future proceedings, it has been applied in *every* Allocation Phase proceeding that followed, including the most recent 2010-13 cable royalty proceeding. *See* 2010-13 Cable Order; 1978 Final Determination at 63042; *see also* Order Regarding Discovery, 14-CRB-0011-SD (2010-13) (July 21, 2016) (ruling that the Unclaimed Funds Ruling applies in the on-going 2010-13 satellite royalty allocation proceeding).

intervening years, the parties—including JSC—have prepared testimony based on data that must be collected contemporaneously and in reliance on the continued application of the Unclaimed Funds Ruling. Because no party raised the Unclaimed Funds Ruling at a sufficiently early juncture, to reverse the Ruling now would violate due process.

Given that preparation of the parties' studies and evidence begins years in advance of a contested proceeding, it would be fundamentally unfair to make a radical change in the applicable legal standard at this stage and would pose serious due process issues. *See, e.g. Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 402 (D.C. Cir. 2005) ("[D]ue process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard . . .") (citing *Hatch v. FERC,* 654 F.2d 825, 835 (D.C. Cir. 1981)). "Normally, an agency must adhere to its precedents in adjudicating cases before it," and even where the statutory scheme allows for some deviation from precedent, doing so is permissible only if "the affected parties have not detrimentally relied on the established legal regime." *Consol. Edison Co. of New York, Inc. v. FERC,* 315 F.3d 316, 323 (D.C. Cir. 2003); *see also Woodward v. Dep. of Justice,* 598 F.3d 1311, 1315 (Fed. Cir. 2010) (agency erred in applying new standard to adjudication "where claimants made strategic decisions in reliance on the old standard, before the new standard existed."). Here, JSC and other parties have prepared their cases in reliance on precedent that has been followed consistently for decades, and it is well settled that "the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." *Clark-Cowlitz Joint Operating Agency v. FERC,* 826 F.2d 1074, 1082-83 (D.C. Cir. 1987). Program Suppliers recognized this reliance interest in the 2010-13 cable and satellite proceedings, as did the Judges. *See* 2010-13 Cable Order at 5, 6.

Program Suppliers last attempted to re-litigate the Unclaimed Funds Ruling in the 2010-13 cable and satellite royalty distribution proceedings. 2010-13 Cable Order at 1 (denying Program Suppliers' request to overturn the Unclaimed Funds Ruling). As now, in the 2010-13 proceeding Program Suppliers did not file a motion or otherwise formally request the Judges to determine that the Unclaimed Funds Ruling should be reversed; instead, Program Suppliers simply propounded discovery requests seeking discovery that would only be relevant if the Ruling did not apply. *See, e.g.*, Joint Motion of Settled Category Representatives to Confirm or Clarify Order for Further Proceedings, 14-CRB-0010-CD (2010-13) (Mar. 18, 2016) (seeking clarification that Program Suppliers' inter-category claims discovery requests were improper). Program Suppliers sought this discovery years after the royalty funds at issued had been paid to the Copyright Office. Program Suppliers' discovery requests in the 2010-13 proceeding touched off months of briefing, resulting in an order confirming the continued application of the Unclaimed Funds Ruling approximately four months later. *See* 2010-13 Cable Order.

In resolving the 2010-13 dispute, Judges specifically cautioned that a party seeking a change to the Unclaimed Funds Ruling could only do so "at a sufficiently early juncture." *Id.* at 6 n.10. The Judges further suggested, although they did not expressly decide, that a request to reverse the Ruling may need to be initiated via notice-and comment rulemaking and "at a time sufficiently proximate to the distribution year at issue in order to avoid reliance by claimants and their representatives on the historical allocation process." *Id.* Program Suppliers did not heed this warning and instead waited nearly three years to raise the issue of the Unclaimed Funds Ruling again, during which time satellite carriers have continued to make royalty payments and the parties have continued to collect contemporaneous evidence in preparation of the Allocation Phase cases they intend to present.

For all of the above reasons, the Judges should leave the forty-year-old Unclaimed Funds Ruling intact.

II. The Judges Should Continue to Use the Stipulated Claimant Category Definitions

Both Program Suppliers and MGC propose modifications to the Claimant Category definitions. Neither provides a valid basis for changing the definitions, and therefore their proposals should be rejected.

A. Program Suppliers' Proposed Revisions Harm the Definitions

Program Suppliers argue that the Judges should revise the category definitions to "eliminate any ambiguity regarding which of the Claimant Group Definitions include sports programming, and, in particular, non-live-team sports programming." PS Br. at 7. Program Suppliers do not point to any actual ambiguity or confusion resulting from the current definitions. Indeed, rather than resolving ambiguity, Program Suppliers' suggested revisions are illogical and harm the definitions.

Based on Program Suppliers' brief, one would think that there have been disputes between Program Suppliers and other parties regarding what Claimant Category(ies) Program Suppliers' non-live team sports fall under. However, no such disputes exist. Program Suppliers themselves indicated that the categories were clear and not in need of revision as recently as the 2010-13 cable and satellite proceeding. *See* Joint Comments of 2010-13 Satellite Participants On Phase I Claimant Category Definitions, 14-CRB-0011-SD (2010-13) (Oct. 9, 2015). Program Suppliers do not cite a single non-live team sports program for which there was a categorization dispute in the 2010-13 satellite proceeding. JSC did not assert a right to royalties for non-team sports. Absent such disagreement, there is no need for a revisions to the longstanding definitions to clarify that non-live-team sports belong in the category to which all parties and the Judges understand they belong.

Not only are Program Suppliers' proposed revisions unnecessary, they actually render the definitions less clear. For example, Program Suppliers propose to add the following underlined terms to the JSC definition: "Live telecasts of professional and college team sports broadcast by U.S. television stations, except those sports programs that fall within the program types for the following claimant groups: Commercial Television or Program Suppliers." PS Br. at App. A.[5] However, there are no live telecasts of professional and college team sports by U.S. television stations that fall within the Commercial Television or Program Suppliers categories. By suggesting that Program Suppliers (or Commercial Television Claimants) have a right to programming that undisputedly belongs to JSC, Program Suppliers' proposed revisions create ambiguity where there has been none.

If tightening category definitions was Program Suppliers' true intention, they would suggest beginning their own category definition with a reference to infomercials, which represent a far greater percentage of Program Suppliers' programming than do non-live-team sports. Corrected Written Rebuttal Testimony of James M. Trautman in Doc. No. 14-CRB-0010-CD (2010-13) (Public Version), at 17 (Oct. 5, 2017) ("Trautman WRT"). But informercials are not valuable, and so Program Suppliers do not say a word about them. Instead, they focus on non-live-team sports programming, which, not coincidentally, has also been a focus of their recent litigation strategy.[6]

[5] Program Suppliers' Appendix A contains incorrect redlining, which wrongly suggest that the current JSC category is defined as "Live telecasts of professional and college team sports broadcast by U.S. television stations, except programs program types claimed byin that fall within program types claimed byin the category [*sic* throughout]." JSC omits these errors in setting forth Program Suppliers' proposed revision above.

[6] In the 2010-13 proceeding, Program Suppliers spent significant energy arguing for the value of non-live-team or "Other" sports programming, including the presentation of a survey of cable operators conducted by Howard Horowitz that solicited valuations for an "Other Sports" category. 2010-13 Cable Final Determination at 3584. Cable operators, however, did not value the *de minimis* Other Sports programming on distant signals nearly as highly as they valued JSC's live professional and college team sports programming. Written Rebuttal Testimony of Daniel Hartman in Doc. No. 14-CRB-0010-CD (2010-13) (Public Version), at ¶¶ 35-36 (Sept. 15, 2017) ("Hartman WRT"); Written Rebuttal Testimony of Allan Singer in Doc. No. 14-CRB-0010-CD (2010-13) (Public Version), at

In short, the category definitions are clear and understood by the parties and the Judges. There have been no disputes about the proper categorization of sports content, and the parties are free to fashion (and have in fact fashioned) studies that accurately reflect the categorization of "Other Sports" content. Thus, there is no need to adopt Program Suppliers' proposed revisions relating to the categorization of such content.

B. Multigroup Claimants' Proposed Revisions Should Be Rejected

MGC seeks to expand the JSC definition to include all "programming of a predominantly sports nature." There is no basis for MGC's requested revisions. MGC has never participated in an Allocation Phase proceeding and does not point to any specific content owner it represents in this proceeding whose programming would change categories under MGC's proposed re-categorization. The current JSC definition is neither arbitrary nor counterintuitive as MGC suggests, and it does not have a monetary impact on any MGC claimant.

MGC claims that "no information or study has ever been presented . . . which demonstrates that system operators select programming according to the criteria that differentiates the narrower definition of 'sports programming' from what is more generally understood to be 'sports programming.'" MGC Br. at 13. This is wrong. To the contrary, the definition is purposely limited to live professional and collegiate team sports because such programming is distinct from other types of sports programming, as JSC has repeatedly demonstrated. As Allan Singer, former Senior Vice President of Content Acquisition at Comcast, testified in the 2010-13 cable proceeding, "industry professionals routinely consider [live professional and college team sports] to be a distinct (and uniquely valuable) category." Singer WRT at ¶ 11; *see also* Hartman WRT

¶¶ 11-13 (Sept. 15, 2017) ("Singer WRT"). The Judges did not find that the addition of an "Other Sports" category resolved any ambiguity but instead diminished the reliability of the survey because "there may have been little to no 'other sports' content." 2010-13 Cable Final Determination at 3590. The Judges reallocated the Horowitz Surveys' "Other Sports" valuations to each other Claimant Category on a proportional basis. *Id.* at 3591.

at ¶ 36 (former DirecTV Senior Vice President of Programming Acquisition testified that "[i]t is generally understood, for example, that live professional and college team sports competitions comprise a distinct and uniquely valuable subset of programming"). A live professional or collegiate baseball, football, basketball, or hockey game is very different than a horse race or professional wrestling, both of which would be forced into the JSC definition under MGC's proposal.[7] In fact, programming services like Gracenote—upon which both JSC and Program Suppliers relied in the 2010-13 cable and satellite proceedings—identify "team v. team" as a unique program "type."

MGC also claims that the current JSC definition has a "dramatic monetary consequence." *Id.* at 13-15. MGC argues that a particular program's value will differ merely by virtue of the category in which it is placed, and that this requires revision to the definition of sports programming categories. Again, MGC is wrong. The high relative awards to JSC reflect the intentional decision of the Judges to award a large share of royalties to the owners of live professional and college team sports content. MGC's imagined hypothetical of a program gaining value from switching from one category to another is incoherent, because it assumes that the Allocation Phase awards to each category would remain unchanged notwithstanding the change to the category definitions.

Additionally, even if the awards did not differ as a result of the change to the definition, MGC's "monetary consequences" would only arise on the assumption that the Judges would rely upon inaccurate measures to allocate programming within the very broad, heterogenous "category" of "programming of a predominantly sports nature." *Id.* at 13-14. Therefore, even if MGC's

[7] Tellingly, MGC does not provide any details as to what would fall into the JSC category under its expanded definition. Instead, it simply asserts that the expanded definition should include "programming of a predominantly sports nature," but is silent as to how this determination would be made.

definition were adopted, and if MGC could identify a claimant it represents who would be part of its proposed broader sports category, the changed definition would be immaterial to that claimant's royalty allocation if a proper methodology is used to determine the allocation within the broader category.

CONCLUSION

For the foregoing reasons, the Judges should continue to apply the Unclaimed Funds Ruling in the proceedings to allocate 2014-17 satellite royalties, and should not modify the claimant category definitions with respect to the categorization of non-live-team sports programming.

Respectfully submitted,

JOINT SPORTS CLAIMANTS

By: /s/ Michael Kientzle

Daniel A. Cantor (D.C. Bar No. 457115)
Michael Kientzle (D.C. Bar No. 1008361)
Bryan L. Adkins (D.C. Bar No. 988408)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
202.942.5000 (voice)
202.942.5999 (facsimile)
Daniel.Cantor@arnoldporter.com
Michael.Kientzle@arnoldporter.com
Bryan.Adkins@arnoldporter.com
Counsel for the Office of the Commissioner of Baseball

Dated May 3, 2019.

Exhibit A

Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of	)
	)
Distribution of Cable Royalty Fees	)

BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ITS MEMBER COMPANIES, AND OTHER PROGRAM PRODUCERS AND DISTRIBUTORS ON THE ISSUE OF CATEGORIES OF CLAIMANTS NOT FULLY REPRESENTED

In response to the "Cable Distribution Schedule of Proceedings" issued May 7, 1980, by the Copyright Royalty Tribunal (Tribunal), the Motion Picture Association of America, Inc., its member companies, and other companies engaged in the production and/or distribution of programming exhibited by television broadcast stations,[1/] submit their brief "on the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants" (hereinafter "unclaimed fund").

At the very outset it is important to recognize that consideration of alternative bases of allocation of the unclaimed fund arises only after a decision as to the allocable shares of groups of claimants in Phase I of this proceeding. Having made that determination the Tribunal would then be in a position to determine in Phase II the bases for allocation and distribution

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1/ The member companies and other program producer/distributor companies are listed in Attachment A.

of the cable royalty fund, including the unclaimed fund, to individual claimants.

The questions presented by the unclaimed fund permeate the showing of each category of claimants in this proceeding. Two possible bases exist for distribution of that fund: (1) distribution of the unclaimed fund in a particular category of claimants to the eligible claimants within the same category; or (2) apportionment and distribution of the total unclaimed fund in all categories among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the cable royalty fund.

1. Are Any Categories Fully Represented?

Before addressing these alternative bases for distribution of the unclaimed fund it is important to address first the continuing refrain of Joint Sports and Music claimants in this proceeding that they represent 100% of all eligible claimants in their respective categories, while others represent less than 100%. This claim is not supported by the record and the facts show that neither category represents 100% of the eligible claimants. Indeed Music interests face the threshhold question as to whether any eligible claimants are before the Tribunal.

ASCAP's "Filing of Claims to Cable Royalty Fees" (dated July 24, 1978) states: "The claim is filed on behalf of all ASCAP members, pursuant to their membership agreements with ASCAP." (Emphasis added.) This indicates clearly that the basis for the claim is the membership agreement, but no showing has been proferred that the membership agreement authorizes ASCAP to represent its

members in filing claims before the Copyright Royalty Tribunal.[2/]

Assuming arguendo that ASCAP, SESAC, and BMI can be considered as the proper parties to file claims for cable license fees under the Act, the record shows that 100% of the individual claimants will not receive distribution even though music is basing its present claim on 100% of music used in distant signal carriage. This results from a continuing situation in which members whose works are used, thereby entitling them to distribution, cannot be found. ASCAP's counsel testified as to the situation:

> MR. KORMAN: I might comment ASCAP, the performing rights, are the only people in this room who deal regularly with this problem. ASCAP runs into a situation frequently where there is no member share.
>
> We have older works. You would have a composer or estate of a composer as a member, but the author has disappeared. He is nowhere to be found. His descendants are not known, and the work is performed. The composer does not get the lyric writer's share earned by those performances nor [does] the publisher.
>
> That goes into a pot and is shared by all members. (3/31/80 Transcript, pp. 60-61).

The fact that these members cannot be found, regardless of the reasons, means that a certain portion of otherwise eligible music

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2/ The "Amended Consent Judgment," Civil Action No. 13-95, entered March 14, 1950, in United States of America v. American Society of Composers, Authors and Publishers, et al., provides in part as follows:

> IV. Defendant ASCAP is hereby enjoined and restrained from:
>
> (A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis.

claimants will not share in the distribution of the cable royalty fund, with the direct result that the remaining members' share will be increased proportionately. This has the same effect as allocating to any group or category of claimants a share of the cable royalty fund on the basis of 100% representation when in fact less than 100% of the eligible claimants will share in the proceeds. The Tribunal, if it determines ASCAP, SESAC, and BMI have technically met the filing requirements, must look to the practical aspects of how music's share will be distributed.

The disparity between 100% of the music claimed and distribution among less than 100% of eligible claimants results in a claim by Music of a larger share of the cable royalty fund than could be justified by individual claims. In view of this effect, the Tribunal should find that the music category does not fully represent its total number of eligible claimants.

The Joint Sports Claimants argued in their Pretrial Memorandum (dated January 31, 1980), that "No claimant is entitled to royalties simply on the basis of an assertion that it is associated in some way with some amorphous class of programming ..." (p. 8). Rather, they argued individual claims must be substantiated before a claim would be allowed. Because Joint Sports Claimants assertedly could justify 100% of their claims for baseball, basketball, hockey, and soccer, they apparently felt that they represent fully -- or, at least, share in the proceeds resulting from -- the entire spectrum of sports programming shown

by distant signal carriage.

The transparency of this claim is evident. Distant signal carriage of sports is not limited to men's professional baseball, basketball, hockey, and soccer, as is implicitly suggested by Joint Sports Claimants, but includes carriage of other sports, e.g., tennis, wrestling, water skiing, motorcross, collegiate sports, golf, boxing, gymnastics, women's professional basketball, high school basketball, and harness racing. (Joint Sports Claimants, Direct Testimony of Bowen and Lemieux, Exhibit D.) All these were apparently used as part of the "amorphous" grouping called sports for purposes of Joint Sports Claimants' distribution proposal even though not all owners of these programs had filed to obtain compulsory license fees.[3/] Again, the practical effect will be to base the share on 100% participation when this is not justified by aggregation of actual individual claims nor by the final distribution of sports' share.

Program Syndicators do not dispute that less than all program owners who would fall in their category have filed claims. It is apparent that the category of broadcasting does not fully represent all eligibile claimants.

Thus it must be concluded that no category fully represents its total number of eligible claimants. Because this situation

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3/ While it appears collegiate sports will attempt to obtain some portion of the sports share, this will still not result in the sports share being distributed to 100% of eligible sports claimants.

occurs within each category before the Tribunal, whatever treatment is required should be applied uniformly. Should the Tribunal believe special treatment be afforded the unclaimed fund, Program Syndicators submit that the best treatment would be to establish each category's share to the cable royalty fund on the basis that they all represent 100% of eligible claimants. This would enable the major question in this proceeding to be decided on a consistent basis vis-a-vis each category. The unclaimed fund should then be segregated by determining what portion of total programming on distant signal carriage was not claimed by an eligible claimant; this would then be distributed in an entirely separate process.

This methodology is reasonable and appropriate because it permits the allocation among categories to be made in a relatively straightforward manner which lends itself to continuing application. Each category can be assumed to represent fully all eligible claimants for purpose of determining the allocable shares for all groups of claimants. This approach also avoids the difficult adjustments that would be required to account for unclaimed amounts prior to an allocation formula being determined. Furthermore, if the allocation is based on full representation, it will provide a better guide for future determinations on distribution shares.

2. How Should The Unclaimed Fund Be Distributed?

Assuming that an unclaimed fund should and can be determined, two possible methods of distribution are open to the Tribunal.

First, and the preferred method in our opinion, those portions of the unclaimed fund relating to a particular category should be distributed to the eligible claimants within the same category. This method recognizes that those most closely identified with the type of programming generating compulsory license fees should receive the benefits so as to stimulate and to promote production and development of programming in proportion to its use by cable systems and benefit to the viewing public. A second method of distribution would be to allocate the unclaimed fund on the basis of each individual claimant's pro rata share of the cable royalty fund.

We believe that the first method is preferred for the following reasons. Perhaps the closest analogy to the legal issues raised by the distribution of the unclaimed portion of the cable royalty fund is the distribution of damages in a class action suit. Under Rule 23 of the Federal Rules of Civil Procedure, once the appropriate class has been determined, the court may require that class members "opt in" to any claim for damages by submitting individual notice of his or her damages. E.g., Sledge v. J. P. Stevens Co., Inc., 585 F.2d 625, 652 (4th Cir. 1978).

The "opting in" procedure under Rule 23 encompasses many of the procedures contained in the Copyright Act of 1976 and the regulations thereunder for filing to receive a portion of the compulsory license fees. Each requires the possible claimants to file a claim by a date certain and thereby cut-off further

claims to possible awards. See Robinson v. Union Carbide Corp., 544 F.2d 1258, 1264 (5th Cir. 1977) (Judge Wisdom, concurring opinion.)

In two class action settlements where a settlement fund was established prior to final resolution of the size of the classes or their respective claims, the courts upheld redistribution of the fund within the same classes when the actual liability was substantially lower than originally anticipated. In Beecher v. Able, 575 F.2d 1010 (2nd Cir. 1978), the court redistributed an established settlement fund which was approximately quadruple the size of the actual claims within the framework of the classes originally set on the basis of the type of securities owned. The Second Circuit upheld this redistribution on the basis that the court acted within its "duty to insure equitable allocation of the proceeds of the settlement." 575 F.2d at 1016; see also Zients v. LaMorte, 459 F.2d 678 (2nd Cir. 1972).

In the Antibiotics Antitrust Litigation the claims of individual consumers were considered to be a sub-class within the larger class of governmental entities. When it was determined that the actual claims of individual consumers were considerably less than the amount apportioned to them as a sub-class, the unclaimed amount was allowed to revert to the class of governmental entities of which they were a part, instead of being made available for distribution among all classes. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D. N.Y. 1970); aff'd, 440 F.2d 1079 (2nd Cir. 1971). The Second Circuit assumed

the propriety of keeping the fund within the same class and indicated that this was the best way to maximize the benefits to the overall class, including the subclass, as opposed to transferring all or a portion of this amount to a different class, as was argued should be done. 440 F.2d at 1091.

The lesson of these cases is that the Tribunal should focus on the proper distribution between categories as if they represented fully all eligible claimants. The first concern of the courts in the above-cited cases was that the settlement amount represented a reasonable resolution for the entire matter. That individual shares turned out to be different within this broader resolution was less important because the courts were not looking for individual resolution. The value of grouping individual parties is that each claim does not have to be resolved separately, but that they can be resolved as a group.

That individuals within the category may get larger shares than they would if others had filed should be of minimal concern where, as here, it will not result in dramatic increases in shares. The essential character of this proceeding, division among categories, will be maintained; future hearings on the same matter can look for some guidance to the allocation among categories used here, rather than starting afresh with different mixtures of individual claimants each year. For these reasons, Program Syndicators believe that the allocation of the entire cable royalty fund should be made among categories of eligible claimants with a specific category dividing among themselves.

As set forth above the alternative method would be to view the unclaimed fund as a separate pot which should be shared on the basis of each claimant's proportionate share of the claimed cable royalty fund. Individual shares in the unclaimed fund would be determined by comparing the amount received by an eligible claimant to the total claimed fund. This factor would then be multiplied by the unclaimed fund to determine the amount going to that individual claimant. This would divide the unclaimed fund equitably among all eligible climants in the same proportion as each received from the claimed cable royalty fund. Under this alternative a proportionate sharing of the unclaimed fund is essential to an equitable distribution. Weighting the share to the unclaimed fund on the same basis as the Tribunal uses for the primary distribution would provide a consistent basis for determining overall distribution.[4/]

For the reasons stated, Program Syndicators urge the Tribunal to determine in Phase I of this proceeding the share allocable to each group of claimants. Two alternatives are available for allocation and distribution of the unclaimed fund. The preferred method would be to permit the amount of the unclaimed fund relating to a specific category to remain within that category for distribution to eligible claimants therein. An alternative method would

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4/ The ASCAP/SESAC boost of 25% for claimants who did not file has no relationship to reality. Its obvious flaw is that while in the small (albeit, inflated) share ASCAP/SESAC claims, the 25% boost does not appear significant, if applied to all categories it will mean a percentage share for all categories totalling well over 100%.

be to segregate the entire unclaimed fund for distribution among all eligible claimants on the basis of their individual shares to the claimed cable royalty fund.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.
ITS MEMBER COMPANIES
OTHER PROGRAM PRODUCERS AND
DISTRIBUTORS

By _____
Arthur Scheiner

_____
Dennis Lane
Its Attorneys

Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036

May 23, 1980

Proof of Delivery

I hereby certify that on Monday, May 06, 2019 I provided a true and correct copy of the Reply Comments of the Joint Sports Claimants Concerning Categorization Issues to the following:

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Global Music Rights, LLC, represented by Scott A Zebrak served via Electronic Service at scott@oandzlaw.com

Broadcast Music, Inc., represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

Broadcaster Claimants Group, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

circle god network inc d/b/a david powell, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

Multigroup Claimants, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

SESAC Performing Rights, LLC, represented by John C. Beiter served via Electronic Service at john@beiterlaw.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Signed: /s/ Michael E Kientzle